Editor's note: Reconsideration granted; case remanded -- See See Natalia Kepuk, 51 IBLA 170 (Nov. 26, 1980).

PAVILLA PAUK

IBLA 76-72 Decided December 23, 1975

Appeal from a decision by the Alaska State Office, Bureau of Land Management, rejecting in part Alaska Native allotment application AA-7159.

Affirmed.

1. Alaska: Native Allotments

   An allotment may be granted only when the Native applicant demonstrates actual substantial use and occupancy of the land at least potentially exclusive of others and not merely intermittent use.

2. Alaska: Native Allotments

   Where a Native allotment applicant has had an adequate opportunity to clearly identify his area of allotment and to present clear and credible evidence to establish his entitlement but has failed to do so, a decision rejecting the application will be affirmed.

APPEARANCES: Henry W. Cavallera, Esq., of Alaska Legal Services Corporation for appellant.

OPINION BY JUDGE RITVO

Pavilla Pauk has appealed from a decision of the Alaska State Office, Bureau of Land Management, dated May 30, 1975, which rejected in part his Native allotment application filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), 1/ and the pertinent regulations in 43 CFR 2651.

1/ Repealed by § 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (Supp. III, 1973).

Appellant filed an application dated May 31, 1971, for two parcels of land along the Togiak River (Parcels A & B) totaling approximately 240 acres which he described in T. 9 S., R. 64 W., Seward Meridian. 2/ He alleged seasonal use and occupancy of the land for fishing, berrypicking, hunting and trapping from 1946 to the date of application. He claimed improvements of a campsite and a fishrack made in 1946 which he valued at $300.

The BLM conducted a field examination of Parcels A & B in August of 1973. The BLM field examiner was accompanied by a Togiak Village representative who was familiar with the area. The improvements of a fishrack, tent frame and barrel stove were found on Parcel B. The examiner's field report indicates that prior to the examination the description of Parcel A as per the application was determined to be in conflict with another Native allotment, AA-6296. Discussions with the village representative and the conflicting applicants had resulted in a correction of the location of Parcel A five miles upstream from the original site in sections 19 and 30 of T. 9 S., R. 63 W., Seward Meridian. No improvements or evidence of occupancy were found on the newly located Parcel A after an extensive aerial search by helicopter and on the ground examination. The examiner with the help of the guide found an abandoned Native village site in the area of the allotment. They could not locate any corner markings or postings for the allotment site. The examiner therefore concluded that the applicant had not met the substantial use requirements of the regulations for Parcel A.

On March 20, 1975, the BLM notified appellant of the findings of the field examination. He was allowed 60 days in which to submit additional information in support of his claim. Appellant responded with his own statement alleging yet another description of the location for his allotment "approximately 55 miles above Togiak River." He did not claim any improvements on Parcel A. He indicated only that there was an old village site across from the allotment. The Bureau's decision followed allowing appellant 120 acres for Parcel B and rejecting all of Parcel A.

On appeal appellant asks that the applications for Parcel A be remanded for reconsideration to insure that the land actually claimed by the appellant is examined for evidence of use and occupancy. He points out that the BLM can approve a 40-acre parcel and still not exceed the 160-acre limitation for an allotment, as provided in the Allotment Act, supra.

2/ These parcels are described as follows:
Parcel A: S 1/2 N 1/2 NW 1/4, S 1/2 NW 1/4, Sec. 29, T. 9 S., R. 64 W., S.M., North of Togiak River and West of Kashaiak River.
Parcel B: N 1/2 S 1/2 SE 1/4, N 1/2 SE 1/4, Sec. 25, T. 9 S., R. 64 W., S.M., South of Togiak River. The 240 acres exceeded the 160-acre maximum permitted by the Act.

[1] A Native allotment applicant is required by the Act to make satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." Such term is defined by regulation, 43 CFR 2561.0-5(a), as:

> The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

[2] We find no merit to appellant's request for additional examination of his claimed allotment for Parcel A. He has already been afforded ample opportunity to identify the area of this parcel and to prove his claim to this allotment area. Clearly, the burden to present clear and credible evidence to establish entitlement is upon the applicant. Gregory Anelon, Sr., 22 IBLA 230 (1975); Maxie Wassillie, 17 IBLA 416 (1974). Appellant has failed to meet this burden. Appellant has at least the initial responsibility to correctly describe the area of the allotment so that it could be examined by the Bureau and to demonstrate that he has used and occupied the allotment as contemplated by the law and the regulations. His designated representative accompanied the BLM field examiner while examination of the general area revealed no indication of his use or occupancy. Appellant has presented no substantial evidence to show the Bureau's decision is in error. With his appeal, appellant has submitted a statement of a witness, dated April 21, 1975. However, we cannot consider this statement as he has not shown why he could not have submitted this statement to the BLM within the 60 day period for submission of such additional information. 3/

3/ In a letter to the Alaska Legal Services Corporation, dated September 24, 1975, the Chief Administrative Judge of the Board of Land Appeals pointed out that: "The Board will not give favorable consideration to new or additional evidence submitted with an appeal in the absence of a showing satisfactory to it why the evidence was not submitted to BLM within the 60-day period afforded the applicant to submit a further showing in support of his application * * *."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Frederick Fishman
Administrative Judge